(2)

03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,

Petitioners,

—v.—

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, TRIAL LAWYERS FOR PUBLIC JUSTICE, AND UNION FOR REFORM JUDAISM IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. OUR CONSTITUTION ENSURES THAT EXECUTIVE DETENTION IS SUBJECT TO THE RULE OF LAW 8

II. THE EXECUTIVE IN THIS CASE HAS NEITHER CONSTITUTIONAL NOR STATUTORY AUTHORITY TO DETAIN HAMDI INDEFINITELY 14

III. HAMDI IS ENTITLED TO CONTEST HIS DESIGNATION AS AN "ENEMY COMBATANT" IN A PROCEEDING THAT COMPORTS WITH DUE PROCESS 18

IV. IF THE GOVERNMENT CANNOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT HAMDI IS AN "ENEMY COMBATANT," IT MUST EITHER TRANSFER HIM TO THE CRIMINAL JUSTICE SYSTEM OR RELEASE HIM 26

V. EVEN IF DOMESTIC LAW AND THE FACTS OF THIS CASE SUPPORT THE EXECUTIVE'S DESIGNATION OF HAMDI AS AN "ENEMY COMBATANT," HIS ONGOING DETENTION VIOLATES THIS COUNTRY'S BINDING TREATY OBLIGATIONS.....27

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U.S. 418 (1979).....23, 25, 27

Bell v. Wolfish, 441 U.S. 520 (1979).....27

Breard v. Greene, 523 U.S. 371 (1998).....29

Brown v. Allen, 344 U.S. 443 (1953).....10

Chandler v. Fretag, 348 U.S. 3 (1954).....20

County of Riverside v. McLaughlin, 500 U.S. 44 (1991).....19

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Estep v. United States, 327 U.S. 114 (1946).....11

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807).. 11

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Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).....25

Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).....11, 22, 25

Ex parte Quirin, 317 U.S. 1 (1942) 24

Foucha v. Louisiana, 504 U.S. 71 (1992).....19, 25

Gideon v. Wainwright, 372 U.S. 335 (1963) 21

Goss v. Lopez, 419 U.S. 565 (1975) 19

Harris v. Nelson, 394 U.S. 286 (1969) 13

Howe v. Smith, 452 U.S. 473 (1981) 15

In re Oliver, 333 U.S. 257 (1948) 19

In re Winship, 397 U.S. 358 (1970) 27

INS v. Chadha, 462 U.S. 919 (1983) 14

INS v. St. Cyr, 533 U.S. 289 (2001) 9, 13

Jackson v. Indiana, 406 U.S. 715 (1972) 27

Johnson v. Eisentrager, 339 U.S. 763 (1950) 24, 25

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 25

Jones v. United States, 463 U.S. 354 (1983). 18

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Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 12

Kent v. Dulles, 357 U.S. 116 (1958) 16

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210 U.S. 373 (1908) 20

Loving v. United States, 517 U.S. 748 (1996) 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 19

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 20

Myers v. United States, 272 U.S. 52 (1926) 13, 14

New York Times Co. v. United States,
403 U.S. 713 (1971) 15

Powell v. Alabama, 287 U.S. 45 (1932) 21

Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983) 21

Raymond v. Thomas, 91 U.S. 712 (1875) 25

Reid v. Covert, 354 U.S. 1 (1957) 14

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 8

Sullivan v. Louisiana, 508 U.S. 275 (1993) 22

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Vitek v. Jones, 445 U.S. 480 (1980) 21

Walker v. Johnston, 312 U.S. 275 (1941). 22

Washington v. Texas, 388 U.S. 14 (1967) 19

Weatherford v. Bursey, 429 U.S. 545 (1977) 21

Withrow v. Larkin, 421 U.S. 35 (1975) 28

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).....passim

Zadvydas v. Davis, 533 U.S. 678 (2001).....18

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U.S. Const. art. I.....14

U.S. Const. art. I, § 9, cl. 2.....11

U.S. Const. art. II, § 3.....14

U.S. Const. art. III, § 2, cl. 1.....28

U.S. Const. art. VI, cl. 2.....28

U.S. Const. amend. VI.....19

10 U.S.C. § 956(5).....17

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28 U.S.C. § 2241.....29

28 U.S.C. § 2243.....22

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Resolution on September 18, 2001, Pub. L. No.
107-40, 115 Stat. 224 (2001).....15, 16

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Petition of Right, 3 Car. 1, c.1 (1627) (Eng.) 10

Habeas Corpus Act of 1641,
16 Car. 1, c. 10, § 6 (Eng.)..... 10, 22

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31 Car. 2, c. 2, § 5 (Eng.).....10, 22

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Prisoners of War. 6 U.S.T. 3316,
75 U.N.T.S. 135 (1956). 27, 28

Miscellaneous

III William Blackstone, *Commentaries* 10

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in the Constitution*, 32 B.U. L. Rev. 144 (1952).....10, 11

Declaration of Independence (U.S. 1776) 9

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Dec. 2, 2003 20

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Virginia (ACLU-VA) and the American Civil Liberties Union of South Carolina (ACLU-SC) are the ACLU's state affiliates in the jurisdictions where Petitioner has been detained throughout these proceedings. For more than eight decades, the ACLU has steadfastly adhered to the position that our nation's fundamental commitment to civil liberties is both most precious and most perilous in periods of national crisis. In support of that position, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The ACLU has also opposed arbitrary and indefinite detention as a violation of due process in many different contexts. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001). The proper resolution of the issues raised in this case is, therefore, a matter of critical importance to the ACLU and its members.

The American Jewish Committee (AJC), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are equally secure. Since the tragic events of September 11, 2001, AJC, like all Americans, has continued to seek the appropriate

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

balance between enhancing our national security and defending our constitutionally guaranteed civil liberties and principles of due process. AJC believes that striking the appropriate balance requires allowing an American citizen access to counsel and to the courts in order to challenge his designation and detention as an "enemy combatant."

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society. Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, our civil justice system, and the protection of the poor and powerless. TLPJ appears as *amicus curiae* in this case because it is committed to ensuring that the United States of America continues to provide – and stand throughout the world as a beacon for – access to justice.

The Union for Reform Judaism (URJ), the congregational arm of the Reform Jewish Movement, encompasses 1.5 million Reform Jews in 900 congregations nationwide. The American Jewish community long has cherished the freedoms guaranteed by the Constitution. Now as we strive, in this age of terrorism, to recalibrate the appropriate balance between our cherished, constitutionally protected freedoms and our national security, we turn to Jewish law for guidance, which affirms the spark of the divine in every individual and mandates the just treatment of all. Inspired by the principles of Jewish law, the Union opposes indefinite detentions without charges, and administrative rulings that deny citizens the constitutionally protected range of due process rights.

STATEMENT OF THE CASE

By the time the Court hears this case, Yaser Esam Hamdi, a United States citizen, will have been detained in a naval brig for two years. He has never been charged or tried for any offense and, until very recently, has been denied access to an attorney.

According to the government,[2] the events leading to Hamdi's detention are as follows. Hamdi went to Afghanistan at some point before September 11, 2001. He was still present in Afghanistan after the United States and coalition forces began military operations in that country in response to attacks by the Al Qaeda terrorist network on the World Trade Center and the Pentagon. The Northern Alliance, which was allied with the United States against Afghanistan's Taliban regime, captured Hamdi in Afghanistan in late 2001. The government maintains that Hamdi was "affiliated" with Taliban forces, for which he would fight "if necessary," and that, at the time of his capture, he was carrying a firearm that he turned over to Northern Alliance forces. (J.A. 148-150)

In Afghanistan, the Northern Alliance held Hamdi in two different prisons that it maintained. At the second, a U.S. interrogation team interviewed him. Thereafter, a U.S. military officer ordered his transfer to a U.S. detention facility in Kandahar. After another "military screening" in January 2002, Hamdi was taken to the Naval Base at Guantanamo Bay, Cuba. In April 2002, based on records demonstrating Hamdi's U.S. citizenship, the government removed him from Guantanamo Bay, separating him from other persons captured in Afghanistan, and transferred him to the Norfolk Naval Brig. In August 2003, the government

[2] As noted below, Hamdi's father filed a habeas petition as next friend to his son in which he disputes the government's version of the background events in this case.

apparently moved Hamdi to a naval brig in Charleston, South Carolina.

Hamdi's father, acting as next friend, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the detention of Hamdi by Secretary of Defense Donald Rumsfeld and Commander W.R. Paulette.[3] While not granting the writ, the district court instructed the government to allow counsel to have access to Hamdi. (J.A. 113-116) On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded to the district court for consideration of the "implications" of allowing Hamdi to meet with counsel, and an assessment of any arguments presented by the government in opposition to the petition for habeas relief. (J.A. 337-344) In particular, the court instructed the district court to consider a declaration that had been submitted by the government ("Mobbs Declaration"), which purported to set forth the justification for Hamdi's designation and detention as an "enemy combatant." (J.A. 342)

On remand, the district court determined that the government's declaration "standing alone" did not permit meaningful review of Hamdi's detention. (J.A. 282-299) In particular, the court was concerned about the fact that the declaration was not based on first-hand knowledge but rather relied upon hearsay from officials with the Northern Alliance, whom the court described as feudal "warlords." (J.A. 295) The court did not, however, require the government to allow Hamdi to meet with counsel based on its concerns; rather, it ordered the government to produce additional documentary evidence beyond the Mobbs Declaration. (J.A. 294)

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[3] An earlier habeas petition filed by the Federal Public Defender appointed to represent Hamdi was dismissed on the grounds that the attorney did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d 598, 603-07 (4th Cir. 2002).

The government again filed an interlocutory appeal, and the Fourth Circuit again reversed the district court. (J.A. 415-455) As a threshold proposition, the appeals court held that the President's constitutional powers as Commander-in-Chief gave him ample authority to detain Hamdi as an "enemy combatant" based on what it described as the "undisputed" premise "that Hamdi was captured in a zone of active combat in a foreign theater of conflict." (J.A. 417-418) While acknowledging that judicial review was appropriate, the court limited its inquiry to whether the government had "set[] forth factual assertions which would establish a legally valid basis for [Hamdi's] detention." (J.A. 453) Applying that standard, the court then concluded that the Mobbs Declaration was sufficient to justify Hamdi's ongoing detention. The court reached this conclusion notwithstanding the fact that the allegations contained in the Mobbs Declaration were based on hearsay statements whose reliability had never been tested, and that no court has ever had the opportunity to hear Hamdi's version of what transpired.

Hamdi's petition for rehearing en banc was denied with several dissents. (J.A. 458-533) Judge Luttig dissented from the denial of rehearing, noting that, until Hamdi is given a chance "to speak for himself or even through counsel," no facts about his case are "undisputed," let alone facts that could be viewed as dispositive of his petition. (J.A. 494) Judge Motz, joined by Judges King and Gregory, also dissented from the denial of rehearing. In addition to the reasons offered by Judge Luttig, Judge Motz noted that the extreme deference given by the court to the Executive's designation of a citizen as an "enemy combatant" threatened "to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms granted all citizens." (J.A. 517) As set forth in her opinion, Judge Motz could discern no basis in either the Constitution or any legal precedent for stripping a citizen of all constitutional

protections based solely on the government's untested accusation that he is an "enemy combatant." (J.A. 518)

SUMMARY OF THE ARGUMENT

This case raises the most fundamental issues that a court can be asked to decide. Acting through his Secretary of Defense, the President has asserted the unilateral right to imprison an American citizen without charges, without trial, without access to counsel except under terms and conditions that the Executive is free to dictate, and without the protection of international treaties ratified by the United States that are designed to protect even foreign soldiers captured in wartime.

The Executive, moreover, has claimed this unlimited authority for an unlimited time. In the government's view, Hamdi can remain imprisoned for the rest of his life if the Executive deems it expedient. Nor is that scenario far-fetched. The conflict in Afghanistan has been expressly linked to the broader "war" against terrorism, and we have repeatedly been told that the "war" against terrorism may never have a conclusive end. Much more than the liberty of a single detainee is therefore at stake.

1. Our system of laws does not entrust any one person, including the President, with such unbridled power to abridge individual liberty. When such abuses occur, habeas corpus is the appropriate remedy. The fact that the President has designated Hamdi an "enemy combatant" does not resolve these issues; it merely brings them into focus. In this battle over first principles, the Court need not resolve the difficult question of whether this country is now "at war" in a constitutionally meaningful sense. Even in wartime, the President's power is subject to limitations imposed by Congress and the Constitution. The Executive in this case has disregarded both.

2. Hamdi's continued imprisonment violates 18 U.S.C. § 4001, which prohibits the detention of American citizens without legislative approval. The Executive's argument that the Congressional resolution authorizing the use of force in Afghanistan also allows him unilaterally to designate citizens as "enemy combatants" and to detain them indefinitely both stretches the language of that resolution and ignores the clear statement rule that this Court has imposed as a necessary predicate to any claim by the Executive to curtail individual liberty.

3. Even if Hamdi's detention is not precluded by statute, he is entitled to a meaningful hearing to contest his designation by the government as an "enemy combatant." At a minimum, that means that he must be granted access to counsel and provided an opportunity to present his side of the story. He has still not received the latter, and the government's grudging concession that Hamdi may now meet with his lawyers in monitored sessions that the government can terminate when it chooses is both too little and too late. The right to counsel is not meaningful if it can be delayed until the hearing is over. And the right to a hearing is not meaningful if the government can prevail based on a showing of "some evidence" that is never subject to rebuttal. The writ of habeas corpus was developed to prevent arbitrary executive detention. Due process was enshrined in our constitutional scheme in order to forbid it.

4. If it is determined that Hamdi is not an "enemy combatant" after a constitutionally adequate hearing, he must either be released or remanded to the criminal justice system where the government can pursue any accusations of wrongdoing accompanied by all the traditional procedural safeguards.

5. On the other hand, if Hamdi is designated as an "enemy combatant" after a constitutionally adequate hearing, he must then be treated in accordance with international

protocols that the United States has ratified and that we properly rely on as a nation to protect our own captured soldiers. Specifically, the Geneva Convention requires that Hamdi be treated as a prisoner of war unless and until it is determined by a "competent tribunal" that he has forfeited that status by acting as an "unlawful combatant." So far, the government refuses to convene a competent tribunal and it refuses to treat Hamdi like a prisoner of war. The unique circumstances of this conflict may require even greater legal safeguards but, at a minimum, they do not permit the government to ignore the rudimentary legal procedures that it is committed by treaty to provide.

Thus, under any conception of Hamdi's status – wrongfully accused civilian or "enemy combatant" – his detention is illegal. He is therefore entitled to a writ of habeas corpus unless the government fulfills its legally binding obligations. Anything less would threaten both the integrity of our constitutional system and the rule of law.

ARGUMENT

I. OUR CONSTIUTION ENSURES THAT EXECUTIVE DETENTION IS SUBJECT TO THE RULE OF LAW

Since the Magna Carta was signed almost eight hundred years ago, Anglo-American law has viewed executive detention as contrary to a system of ordered liberty. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land."). By expressly guaranteeing the availability of the historic writ of habeas corpus in the Constitution, the

Framers specifically sought to prevent arbitrary executive detention. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in result) ("the traditional Great Writ was largely a remedy against executive detention").[4]

As an historical matter, habeas corpus developed as a counter to the King's assertion of an "executive prerogative" to detain subjects without formal charges in alleged furtherance of the national interest. The issue came to a head in *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627), where five individuals (among hundreds similarly detained) unsuccessfully challenged their imprisonment for refusing to contribute to a forced loan that Charles I deemed critical to the defense of the kingdom, then at war with France and Spain. *See* Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 59 (1960). The King's attorney asserted that the imprisonment was "by the special command of his majesty," 3 How. St. Tr. at 3 – a power that the King deemed necessary for those "matter[s] of state" that were "not ripe nor timely" for the ordinary criminal process. *Id.* at 37; *see also* Walker, *supra*, at 67. The prisoners' lawyers warned that unless the Crown were required to provide a charge for which the prisoners could be tried, their imprisonment "shall not continue on for a time, but for ever," and all people "may be restrained of their liberties perpetually" without remedy. 3 How. St. Tr. at 8; *see also* Walker, *supra*, at 67.

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[4] The Framers' decision to charter a government of enumerated powers can also be viewed as a direct response to their experience with executive overreaching. *See* The Declaration of Independence, para. 2 (U.S. 1776) ("The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

Parliament responded to *Darnel's Case* with the Petition of Right, prohibiting imprisonment without due process and imposing restraints on the use of martial law. 3 Car. 1, c. 1 (1627) (Eng.). When the King continued detaining individuals on vague, ill-defined charges, Parliament enacted the Habeas Corpus Act of 1641, commanding jailors to provide a lawful basis for confinement and requiring courts to act promptly by discharging, bailing or remanding prisoners to custody for criminal trial. 16 Car. 1, c. 10, § 6 (Eng.) (court shall promptly "examine and determine whether the cause of such commitment be just and legall or not"). The 1641 Act also eliminated the notorious Star Chamber and restricted the jurisdiction of the King's Privy Council, long associated with arbitrary and executive imprisonment, secrecy and torture, particularly for suspected offenses against the State. *Id.* § 3, *see* John H. Langbein, *Torture and the Law of Proof* 90, 136 (1976). The Habeas Corpus Act of 1679 provided reinforcement by requiring that, in cases of commitment for any "criminal or *supposed criminal matters*," prisoners either be released or quickly brought to trial. 31 Car. 2, c.2 (Eng.) (emphasis added); *see also* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rights L. Rev. 555, 563 (2002).

Through these developments, the Great Writ ensured that detention absent formal charges would not be permitted. 9 Sir William Holdsworth, *A History of English Law* 118 (3d ed. 1944) (describing writ as "the most effective weapon yet devised for the protection of the liberty of the subject"); III William Blackstone, *Commentaries* *130 (habeas corpus is the "great and efficacious writ, in all manner of illegal confinement"); *see Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Zechariah Chafee, Jr., *The Most*

Important Human Right in the Constitution, 32 B.U. L. Rev. 144, 144 (1952).

This understanding of the writ as a vehicle to ensure due process informed the Framers when they crafted our Constitution and Bill of Rights. *See* Daniel J. Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* 24 (1966). Specifically, they believed that the writ of habeas corpus would provide "greater securities to liberty" than other provisions of the Constitution, because "the practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Hamilton).

Suspension of the writ was generally understood as the *only* way to detain an individual for wrongdoing without formally charging and trying him. Further demonstrating their intention to limit the executive's power to detain indefinitely, the Framers determined that only Congress could suspend the right to judicial review of executive detention, U.S. Const. art. I, § 9, cl. 2; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861), and only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2; *see* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (5th ed. 1891). By granting this power to Congress, as opposed to the President, the Framers ensured that no branch of government had the unilateral power to deprive a person of liberty. Moreover, by vesting this authority in Article I, the Framers ensured that this important decision would be made by the more representative and deliberative branch of government.

Even in the face of grave national emergencies, the Great Writ applies with full force. As one of England's leading constitutional scholars observed almost a century

ago, when contemplating the type of threats that we today label as terrorism:

> Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or imprisonment they would at once be brought before the High Court on a writ of *habeas corpus*, and unless some specific ground for their detention could be shown they would be forthwith set at liberty.

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 222 (7th ed. 1908) (footnote omitted).

The Framers also contemplated circumstances where grave national emergencies might justify the temporary abridgement of individual liberties. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (noting that the Constitution is not a "suicide pact"). In light of their experience with executive abuses, however, they deemed the legislature to be the branch best entrusted with the power to suspend the writ of habeas corpus. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring).

Notwithstanding the tragic events of September 11, 2001, Congress has not deemed it necessary to suspend the availability of habeas review in order to protect our national interests. Nor can any of its actions or authorizations be interpreted as implicitly suspending the writ. *St. Cyr*, 533

U.S. at 299 ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.") (citing *Ex parte Yerger*, 8 Wall. 85, 105 (1869)).

The Constitution's guarantee of habeas corpus promises more than just an empty proceeding. *See Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by the courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."). It ensures that the judiciary will provide an independent assessment of the legality of the detention and not merely rubber stamp the Executive's actions. *Cf. Estep v. United States*, 327 U.S. 114, 133-34 (1946) (Rutledge, J., concurring) (cautioning against making the judiciary "a rubber stamp in criminal cases for administrative or executive action"). Otherwise, the Constitution's guarantees of liberty and due process would be subject to the whims of men as opposed to the rule of law. *See Myers v. United States*, 272 U.S. 52, 292 (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'").

II. THE EXECUTIVE IN THIS CASE HAS NEITHER CONSTITUTIONAL NOR STATUTORY AUTHORITY TO DETAIN HAMDI INDEFINITELY

In addition to being a government of enumerated authority,[5] our system also reflects a separation of powers between three co-equal and coordinate branches of government. *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers. . . ."). As Justice Brandeis noted, "[t]he doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power . . . and to save the people from autocracy." *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting). The Framers knew that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). *See also Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (noting that Framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws").

With regard to the allocation of powers among the various branches, "the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S. at 587. Under our constitutional system, only Congress has the authority to make the law. U.S. Const. art. I. The Executive, by contrast, "shall take care that [those] Laws be faithfully executed." U.S. Const. art. II, § 3; *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The lawmaking function belongs to

[5] *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (Black, J., plurality op.) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.").

Congress . . . and may not be conveyed to another branch or entity."). Even when issues of national security are at stake, "convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." *New York Times Co. v. United States*, 403 U.S. 713, 742-43 (1971). Unless the Executive can demonstrate that his actions have either been authorized by Congress or are part of the powers bestowed upon him by Article II of the Constitution, his actions are constitutionally proscribed. *See Youngstown*, 343 U.S. at 635-38.

Congress has spoken on the issue of executive detention and has explicitly denied the Executive branch the power it has tried to claim here. In recognition of the gross injustice suffered by Japanese-Americans interned during the Second World War, in 1971 Congress enacted the Non-Detention Act, which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This Act repealed the Emergency Detention Act of 1950, which gave the Attorney General the authority to detain people suspected of espionage or sabotage during periods of invasion, declared war or insurrection. As this Court explained, the "plain language of § 4001(a) proscribe[s] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The government insists that the Executive received an implicit grant of authority by Congress to detain indefinitely any American citizen designated as an "enemy combatant" when it passed the Authorization for Use of Military Force Joint Resolution on September 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution").[6]

[6] The Joint Resolution provides in relevant part that

The government further argues that a contrary interpretation would improperly impinge on the President's authority as Commander-in-Chief. Even assuming that the Joint Resolution permits the initial detention of United States citizens apprehended abroad in an active combat zone, the government's claim gives far too little weight to the serious concerns that led Congress to enact § 4001.

Hamdi has now been detained on American soil for almost two years. Whatever battlefield exigencies may have surrounded his initial detention no longer exist. Under these circumstances, the government's assertion that the Joint Resolution should be construed as a perpetual override of § 4001 conflicts with this Court's instruction that the judiciary "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers *intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.*" *Ex parte Endo*, 323 U.S. 283, 300 (1944) (emphasis added). *See also id.* at 303-04 (holding that Congress did not "clearly and unmistakably" authorize the indefinite detention of Japanese-American citizens when it enacted a statutory evacuation program); *cf. Kent v. Dulles*, 357 U.S. 116, 129 (1958) (noting that courts must "construe narrowly all delegated powers that curtail or dilute" a citizen's ability to take part in "activit[ies] included in constitutional protection").

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution § 2(a).

The government also suggests that 10 U.S.C. § 956(5) authorizes the indefinite detention of American citizens whom the Executive deems to be "enemy combatants." This provision, however, merely provides funding for "expenses incident to the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [Armed Services]," including those held "pursuant to Presidential proclamation." *Id.* When faced with a similar argument in *Ex parte Endo*, this Court rejected the idea that an appropriations bill could be construed as an affirmative grant of authority, insisting instead that "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." 323 U.S. at 303 n.24.

As Justice Jackson explained in *Youngstown*,

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only [by] disabling the Congress from acting upon the subject. *Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added). This is such a case. The Suspension Clause specifically prohibits the Executive from unilaterally detaining citizens without due process unless Congress deems such action necessary to cope with a national emergency. The Non-Detention Act further prevents the Executive from detaining citizens in the absence of express

legislative authority. Faced with such clear directives from the Constitution and the Congress, this Court cannot sanction the President's actions in this case without fundamentally undermining one of the bulwarks of our constitutional system, i.e., the separation of powers.[7]

III. HAMDI IS ENTITLED TO CONTEST HIS DESIGNATION AS AN "ENEMY COMBATANT" IN A PROCEEDING THAT COMPORTS WITH DUE PROCESS

The government claims that Hamdi was apprehended with Taliban forces on a battlefield in Afghanistan and that he surrendered a weapon. The government's mere assertion of these facts, in its view, is sufficient to designate Hamdi as an "enemy combatant." Hamdi, on the other hand, has never been given the opportunity to defend himself against the accusation that he was, in fact, fighting with the enemy. Thus, no court has ever heard Hamdi's version of the events leading up to his detention by American military forces. Due process requires that Hamdi be given a fair opportunity to contest his designation as an "enemy combatant."

The Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."). The Supreme Court has emphasized that "commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983). *See also*

[7] The relevance of § 4001 is discussed more fully both in other briefs and in the Second Circuit's decision in *Padilla v. Rumsfeld*, 352 F.3d 695, 718-22 (2d Cir. 2003).

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (emphasizing that freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). Even the government concedes that Hamdi is entitled to invoke these constitutional protections as an American citizen detained in this country under color of law.

Whenever the state deprives an individual of his liberty, due process entitles him at a bare minimum to notice of the charges against him and an opportunity to be heard in his defense. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process requires, "[a]t the very minimum," that a person being deprived of liberty "be given some kind of notice and afforded some kind of hearing"); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence.").[8]

Due process is not satisfied by the mere spectacle of a hearing where only the accuser can present his version of the facts. *See, e.g., Washington v. Texas*, 388 U.S. 14, 19 (1967) ("right to present the defendant's version of the facts as well as the prosecution's" is "a fundamental element of due process of law"). Rather, "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if

[8] These same principles also inform other protections contained in the Bill of Rights, such as the Confrontation Clause. U.S. Const. amend. VI. *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (requiring judicial hearing within 48 hours of warrantless arrest to prevent "prolonged detention based on incorrect or unfounded suspicion").

need be, by proof, however informal." *Londoner v. City and County of Denver*, 210 U.S. 373, 386 (1908).

During his two years of confinement, Hamdi has never had the opportunity to tell his side of the story. In fact, the government has physically restrained Hamdi from participating in the proceedings against him by holding him virtually incommunicado. Few more fundamental denials of due process can be imagined. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose *for himself* whether to appear or default, acquiesce or contest.") (emphasis added).

Compounding the problem, Hamdi was denied all access to counsel until very recently. Now that the Fourth Circuit proceedings have concluded, the government has finally allowed some contact between Hamdi and his lawyer, subject to government monitoring. The government also maintains that it can deny Hamdi access to counsel at any point in the future, if it deems such action necessary. This Court has never adopted such a cramped view of the right to counsel. "A necessary corollary [of the right to counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 10 (1954).

Notwithstanding the Executive's arguments to the contrary, Hamdi's right to counsel is not simply a matter of government largesse.[9] The right to counsel is directly related

[9] The government has carefully characterized its decision as "a matter of discretion and military policy," and continues to insist that "[s]uch access is not required by domestic or international law and should not be treated as precedent." Department of Defense, *DOD Announces Detainee Allowed Access to Lawyer*, Press Release, Dec. 2, 2003, available at 2003/nr20031202-0717.html.

to the Constitution's fundamental guarantee of due process. As this Court explained in *Powell v. Alabama*, 287 U.S. 45, 65 (1932), "where the defendant . . . is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process." *See also Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("The right to be heard would be, in may cases, of little avail if it did not comprehend the right to be heard by counsel.").

Although the government insists that Hamdi has no right to counsel because he is not facing criminal charges, the Constitution's fundamental guarantees of due process and access to counsel are more broadly triggered by deprivations of liberty, whether through criminal or civil means. In cases involving non-criminal deprivations of liberty, courts have recognized that a right to counsel is so critical to ensuring that the Constitution's guarantees of due process are satisfied that counsel is often appointed. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) ("A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.") (citing *Addington v. Texas*, 441 U.S. 418 (1979)); *see also Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality op.) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness).

Hamdi's request in this case is even more modest. He simply wishes to exercise his fundamental right to the assistance of counsel free from government interference. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges

between defendant and counsel because of the fear of being overheard."); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (noting that the total deprivation of the right to counsel is one of the few "constitutional errors" that is never "harmless").

Habeas corpus principles reinforce the notion that unrestricted access to counsel is indispensable to due process and fair play. The government cannot simultaneously acknowledge Hamdi's right to petition for habeas corpus and then undermine that right by denying him timely and unrestricted access to counsel. Incommunicado detention is inconsistent with modern habeas practice. *See* 28 U.S.C. § 2243 ("Unless the application for the writ and return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."); *see also Walker v. Johnston*, 312 U.S. 275, 285 (1941). It is also inconsistent with the Writ's historic foundations. *See, e.g.,* Habeas Corpus Act of 1641, 16 Car. 1, c. 10, § 6 (Eng.); 6 *Encyclopedia of the Laws of England* 130 (Renton ed. 1898); *see also* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 5 (Eng.) (imposing sanctions for failure to produce the prisoner). The government's continued refusal to produce Hamdi in person, itself problematic, only enhances the imperative of granting him uninhibited and unmonitored access to counsel. Indeed, in stark contrast to the government's current position, the right to counsel was apparently respected even when habeas corpus was purportedly suspended during the Civil War. *See* Habeas Petition quoted in *Ex parte Merryman*, 17 F. Cas. at 145 ("all access to [the prisoner was] denied except to his counsel and brother-in-law"). Hamdi's ongoing confinement is a reminder that time has not diminished the Writ's historic function nor vitiated the basic due process concerns that have historically guided its use.

In short, the traditional role of habeas corpus and the constitutional requirement of due process both demand that

Hamdi be given the opportunity to defend his liberty with the assistance of counsel. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha*, 504 U.S. at 79 (detainee is "entitled to constitutionally adequate procedures to establish the grounds for his confinement"); *United States v. Salerno*, 481 U.S. 739 (1987); *Addington v. Texas*, 441 U.S. 418 (1979). Just as due process is meaningless without Hamdi's participation, the denial of Hamdi's right to speak through counsel is tantamount in this case to a denial of his right to petition the court for habeas review.

Finally, due process demands that Hamdi's detention be supported by more than "some evidence."[10] The "some evidence" test is derived from administrative law where it functions as a standard of review, not a burden of proof. As such, it presupposes that there was an initial adversarial hearing at which a neutral arbiter made a preliminary determination on the merits. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 663-64 (1988). Here, of course, that is exactly what the government is trying to avoid. Invoking national security concerns, the government claims that a detainee has no right to challenge the evidence upon which his detention rests. The government does not even admit the possibility that its own evidence might either be false or unreliable or incomplete. Because such failures of proof are unlikely to be discovered without an adversarial process, a court applying the government's "some evidence" test – or, more generally, depriving the detainees of any opportunity to contest the basis for his detention – has no way of determining whether there is any credible evidence at all.

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[10] Although the Fourth Circuit claimed that it did not need to reach the question of whether the "some evidence" standard proposed by the government was the appropriate level of review (J.A. 449), it effectively did as much by denying Hamdi any opportunity to contest the evidence and then accepting the government's untested allegations as "undisputed." (J.A. 453)

Cf. Withrow v. Larkin, 421 U.S. 35, 58 (1975) ("Clearly, if an initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to an ultimate decision, a substantial due process question would be raised.").

Contrary to the government's approach, the label "enemy combatant" does not have a talismanic significance that overrides all procedural safeguards.[11] It is not inconceivable that the government has made a mistake.[12] Facing a possible lifetime in prison, Hamdi must be given the opportunity to demonstrate that the government's charges against him are unwarranted.[13] A test that does not even

[11] Although the government borrows the term "enemy combatant" from this Court's opinion in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court in that case was clearly talking about *unlawful combatants* who had violated the rules of war and had been convicted on that basis by a military tribunal. *See also* Stephen I. Vladeck, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 170 n.92 (2004) (noting that the *Quirin* Court's "coinage of the term 'enemy combatant' may have been entirely accidental, since, from the plain language of the opinion, the term only meant to distinguish enemy members of the armed forces from enemy spies or allies"). As used by the government, however, the term "enemy combatant" seems designed to obscure the important differences between lawful and unlawful combatants. *See infra* Section V.

[12] *See, e.g.*, Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and [$]20,000 for a[n al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

[13] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), provides no authority to the contrary. Because that case involved foreign soldiers fighting for a declared enemy who were captured and detained abroad, this Court ultimately held due process did not apply and that the American courts lacked jurisdiction to entertain their claim. Hamdi, on the other hand, is an American citizen detained on American soil. As a result, jurisdiction is not disputed and Hamdi is plainly entitled to invoke the protections of the Due Process Clause. Even in *Eisentrager*, moreover, the Court recognized its duty "to ascertain the existence of a state of war and

claim to consider whether the government's evidence is fabricated or flimsy or less than the whole story cannot possibly function as an adequate constitutional safeguard against arbitrary detention. (J.A. 524-525) At a minimum, the government must present clear and convincing evidence to justify Hamdi's ongoing detention, even if its purpose for doing so is ostensibly non-punitive.[14] *See Addington*, 441 U.S. at 427; *see also Foucha*, 504 U.S. at 86; *Salerno*, 481 U.S. at 751; *cf. Hendricks*, 521 U.S. at 353 (statute required trial to be held to determine that person was a sexually violent predator "beyond a reasonable doubt").

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble. . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Even during times of war, the Executive must respect the boundaries on its authority established by the Constitution. *See, e.g., Youngstown*, 343 U.S. 579 (1952); *Ex parte Endo*, 323 U.S. at 283; *Raymond v. Thomas*, 91 U.S. 712 (1875); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Merryman*, 17 F. Cas. at 144. This Court should learn from the mistakes of the past, *see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944), and refuse to put its imprimatur on the Executive's efforts to undermine fundamental constitutional guarantees of due process and the rule of law.

whether [a petitioner] [is] an alien enemy." *Id.* at 775. Furthermore, the Court reached this conclusion only after a full trial before a military tribunal, during which the petitioners were represented by counsel. *Id.*

[14] *Amici* AJC and URJ have not taken a position on the precise standard of judicial review that should apply under these circumstances, but they fully agree that such review must entail a meaningful examination of the assertions underlying the designation and detention of Hamdi as an "enemy combatant," and that the "some evidence" standard proposed by the government is not the appropriate test.

IV. IF THE GOVERNMENT CANNOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT HAMDI IS AN "ENEMY COMBATANT," IT MUST EITHER TRANSFER HIM TO THE CRIMINAL JUSTICE SYSTEM OR RELEASE HIM

If, after a constitutionally adequate hearing, the government is unable to prove that Hamdi was an "enemy combatant," then the reasons that it currently offers for Hamdi's ongoing detention – i.e., preventing him from rejoining the enemy or facilitating the gathering of enemy intelligence – lose all credibility. The only legitimate basis for keeping Hamdi in custody would be an accusation of criminal wrongdoing. At that point, the government must either initiate criminal proceedings against Hamdi, with all of the concomitant constitutional protections, or release him.

In light of their extensive efforts to limit executive detention, *see supra* Section I, the Framers certainly never contemplated that the government could avoid triggering the protections in the Bill of Rights by simply detaining a citizen indefinitely without ever charging him with a crime. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (noting that the Constitution's guarantee of a speedy trial "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges"). Even when there are legitimate reasons why a criminal prosecution cannot proceed, the Supreme Court has firmly instructed that persons cannot be held indefinitely. If a defendant is determined to be incompetent to stand trial, for example, the government cannot merely detain the defendant merely by asserting public safety concerns. Rather, it must initiate civil commitment proceedings – at

which the prisoner is entitled to counsel – and demonstrate by clear and convincing evidence that the person is a threat either to himself or to others. *Addington*, 441 U.S. at 426-27; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

If the government's justification for Hamdi's ongoing confinement ultimately rests on an accusation of criminal wrongdoing, then the government must prove those allegations beyond a reasonable doubt through the criminal process. *See In re Winship*, 397 U.S. 358 (1970); *cf. Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

V. EVEN IF DOMESTIC LAW AND THE FACTS OF THIS CASE SUPPORT THE EXECUTIVE'S DESIGNATION OF HAMDI AS AN "ENEMY COMBATANT," HIS ONGOING DETENTION VIOLATES THIS COUNTRY'S BINDING TREATY OBLIGATIONS

Assuming that the Executive's actions can be reconciled with the Non-Detention Act and are consistent with the Constitution, Hamdi is still entitled to challenge his confinement by invoking rights and protections grounded in international law and treaty obligations.

On February 2, 1956, the United States ratified the Geneva Convention Relative to the Treatment of Prisoners of War. *See* 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140. Article 5 of the Convention requires all signatories to treat all lawful combatants in the course of armed conflict as prisoners of war ("POWs") "from the time they fall into the power of the enemy and until their final release and repatriation." *Id.* at art. 5. If there is any doubt as to whether a captured individual should be classified as a lawful or an unlawful combatant, the Convention provides that "such

persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* Article 7 of the Geneva Convention specifies that prisoners of war "may in no circumstances renounce in part or in entirety the rights secured to them" by the treaty. *Id.* at art. 7.

The Supremacy Clause makes clear that "all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2. Likewise, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made under [the United States'] authority." U.S. Const. art. III, § 2, cl. 1. In other words, these treaty obligations have the full effect of law in this country. Consequently, before the United States can strip a captured enemy solider of the protections of the Geneva Convention, it must bring the combatant before a competent tribunal for an adjudication of his proper status.

In this case, however, the Executive has never presented Hamdi to a competent tribunal for any determination of whether he was even a combatant, and if he was, whether he can be denied the protections granted to prisoners of war because he was an unlawful combatant. The government has unapologetically stated that it has no intention of complying with the Geneva Convention's requirement that Hamdi be presented to a tribunal, and has unilaterally determined that he is an "enemy combatant" who is not entitled to the protections afforded to a prisoner of war.[15]

The federal habeas corpus statute authorizes courts to grant a writ of habeas corpus whenever a person can demonstrate that his "custody [is] in violation of the . . .

[15] *See, e.g.*, Government's Br. in Opp. 29.

treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3).[16] This means that, even assuming that the government can demonstrate that its actions are consistent with the constitutional and statutory provisions that would normally protect citizens from indefinite executive detention, the government's failure to comply with its international treaty obligations provides an independent basis for granting Hamdi's petition for writ of habeas corpus.[17] At a minimum, this Court should direct the Executive to afford Hamdi all of the protections to which POWs are entitled until he has received a hearing before a competent tribunal to determine his status.

[16] *Cf. Breard v. Greene*, 523 U.S. 371 (1998) (considering, but ultimately rejecting as waived, petitioner's claim that his detention violated the Vienna Convention).

[17] This issue is addressed more fully in other *amicus* briefs.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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